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No. 99-1176

IN THE

Supreme Court of the United States

MCI COMMUNICATIONS CORPORATION AND SUBSIDIARIES AND TELECOM*USA, INC. AND SUBSIDIARIES,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICI CURIAE* OF THE FINANCIAL EXECUTIVES INSTITUTE, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE NATIONAL FOREIGN TRADE COUNCIL, INC., THE TAX COUNCIL, AND THE UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS IN SUPPORT OF PETITIONERS

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11 RP

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTERSEST OF AMICI 1

I. THERE IS A WIDESPREAD SPLIT OF AUTHORITY 2

II. REVENUE RULINGS ARE NOT ENTITLED TO DEFERENCE 3

III. IMPORTANCE OF THE ISSUE 6

CONCLUSION 7

TABLE OF AUTHORITIES

Page(s)

Cases:

Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990).....5

Atlantic Mutual Insurance Co. v. Commissioner, 523 U.S. 382 (1998).....5

Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988).....4

Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).....4

Commissioner v. Idaho Power Co., 418 U.S. 1 (1974).....6

Crow v. Commissioner, 85 T.C. 376 (1985).....2

Estate of Kostow v. Commissioner, 45 F.3d 1524 (11th Cir. 1995).....2, 4

First Charter Finance Corp. v. United States, 669 F.2d 1342 (9th Cir. 1982).....6

First Chicago NBD Corp. v. Commissioner, 135 F.3d 457 (7th Cir. 1998).....3

Foil v. Commissioner, 920 F.2d 1196 (5th Cir. 1990).....3

Gillespie v. United States, 23 F.3d 36 (2nd Cir. 1994).....3

Gillis v. Hoechst Celanese Corp., 4 F.3d 1137 (3d Cir. 1993)..... 3

Johnson City Medical Center v. United States, 999 F.2d 973 (6th Cir. 1993).....3

In re Kaplan, 104 F.3d 589 (3d Cir. 1997).....3

Mead Corp. v. United States, 185 F.3d 1304 (Fed. Cir. 1999).....2, 5

Mercantile Bank & Trust Co. v. United States, 441 F.2d 364 (8th Cir. 1971).....2

Page(s)

Cases:

National Muffler Dealers Ass'n v. United States, 440 U.S. 472 (1979) 4

Northern Indiana Pub. Serv. Co. v. Commissioner, 105 T.C. 341 (1995), *aff'd*, 115 F.3d 506 (7th Cir. 1997) 4

Salomon, Inc. v. United States, 976 F.2d 837 (2d Cir.1992) 3

Smiley v. Citibank, (S.D.), N.A., 517 U.S. 735 (1996) 4, 5

Stark v. Commissioner, 86 T.C. 243 (1986) 4

United States v. Allen-Bradley Co., 352 U.S. 306 (1957) 2

Walt Disney Inc v. Commissioner, 4 F.3d 735 (9th Cir. 1993) 3

Wood v. Commissioner, 955 F.2d 908 (4th Cir. 1992) 3

Statutes, Rules and Regulations

5 U.S.C. § 553(c) 5

26 U.S.C. § 7805(a) 4, 5

Rev. Proc. 89-14, 1989-1 C.B. 814 6

Rev. Proc. 99-1, 1991-1 I.R.B. 6 6

Treas. Reg. § 601.201(a)(6) 6

Treas. Reg. § 601.601 5

Treas. Reg. § 601.601(d)(2)(i)(a) 6

Treas. Reg. § 601.601(d)(2)(v)(d) 5

Treas. Reg. § 601.601(d)(2)(v)(f) 5

INTEREST OF THE AMICI

Amici are professional associations representing a broad spectrum of industry that are directly or indirectly affected by the decision of the United States Court of Appeals for the District of Columbia Circuit.[1] The District of Columbia Circuit's opinion to accord "at least some deference" (Pet. App. 7a) to an Internal Revenue Service revenue ruling deepens the persistent split of authority on whether deference is owed to revenue rulings. The issue of according deference adversely affects every taxpayer, the government, and the approximately $2 trillion in annual tax revenues. *Amici* assert that granting deference to revenue rulings erroneously empowers the IRS to predetermine the outcome of litigation.

The Financial Executives Institute is a professional association representing over 14,000 senior corporate financial officers in over 8,000 corporations throughout the United States and Canada. The National Association of Manufacturers is the nation's largest and oldest multi-industry trade association. It represents 14,000 members, including 10,000 small and mid-size companies, in every industrial sector in all 50 states. The National Foreign Trade Council, Inc. is the oldest and largest United States business association devoted to international trade and tax matters. Its 550-plus member companies include most of the largest U.S. manufacturers and financial institutions, accounting for at least 70 percent of U.S. non-agricultural exports and 70 percent of U.S. private foreign investment. The Tax Council is a nonprofit organization with 114 members that are among the most prominent corporations, businesses and organizations in the nation, including 25 of the 50 largest

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[1] Pursuant to Rule 37.6 of the Rules of this Court, it is declared that no counsel for either party authored this brief in whole or in part. No person or entity, other than *amici curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. Additionally, all parties have consented to the submission of this brief in letters of consent filed with the Clerk of the Court.

corporations in the United States. The United States Council for International Business advances the global interests of American business both at home and abroad and is the American affiliate of the International Chamber of Commerce, the Business and Industry Advisory Committee to the OECD, and the International Organization of Employers.

I. THERE IS A WIDESPREAD SPLIT OF AUTHORITY

The widespread split of authority in the lower courts over deference to revenue rulings suggests that this Court hear the case. During the last decade, the courts of appeals have issued over twenty reported decisions on the issue. The decisions are as varied as the courts that issued them.

The Tax Court, a court that holds "special expertise in tax matters" (*United States v. Allen-Bradley Co.*, 352 U.S. 306, 311 (1957) (Harlan, J., concurring)), consistently holds that revenue rulings are "only the contention of one of the parties to the litigation" and are "not entitled to any special deference." *Crow v. Commissioner*, 85 T.C. 376, 389 (1985). The Eighth, Eleventh, and Federal Circuits agree with the Tax Court and grant no deference to revenue rulings. *See Mercantile Bank & Trust Co. v. United States*, 441 F.2d 364, 368 (8th Cir. 1971) (Revenue rulings are granted no deference as they "are of little aid in interpreting statutes."); *Estate of Kostow v. Commissioner*, 45 F.3d 1524, 1528 (11th Cir. 1995) (Revenue rulings are "merely the opinion of an IRS attorney" and "are not binding on the courts."); *Mead Corp. v. United States*, 185 F.3d 1304, 1307 (Fed. Cir. 1999) (Revenue rulings deserve no deference because they "do not carry the force of law" and are not accompanied by the "procedural safeguards" of notice-and-comment rulemaking.).

Other courts of appeals disagree with the Tax Court and the Eighth, Eleventh, and Federal Circuits, and grant varying degrees of deference to revenue rulings. For example, the Second Circuit has held that revenue rulings "'are entitled to great deference, and have . . . the force of legal precedent unless unreasonable or inconsistent with the provisions of the

Internal Revenue Code.'" *Gillespie v. United States*, 23 F.3d 36, 39 (2nd Cir. 1994) (quoting *Salomon, Inc. v. United States*, 976 F.2d 837, 841 (2nd Cir. 1992)). The Sixth Circuit grants revenue rulings "some deference" unless "[the revenue ruling] conflicts with the statute it supposedly interprets or with that statute's legislative history or if it is otherwise unreasonable." *Johnson City Med. Ctr. v. United States*, 999 F.2d 973, 975 (6th Cir. 1993). The Fifth and Seventh Circuits give revenue rulings "respectful consideration." *Foil v. Commissioner*, 920 F.2d 1196, 1201 (5th Cir. 1990); *First Chicago NBD Corp.*, 135 F.3d 457, 459 (7th Cir. 1999). The Fourth and Ninth Circuits have adopted a "considerable weight" standard. *Wood v. Commissioner*, 955 F.2d 908, 913 (4th Cir. 1992); *Walt Disney Inc. v. Commissioner*, 4 F.3d 735, 740 (9th Cir. 1993). The Third Circuit's standard for deference given to revenue rulings is somewhat unclear, varying from mere "weight" (*Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137, 1145 (3rd Cir. 1993)) to "great deference" (*In re Kaplan*, 104 F.3d 589, 599 (3rd Cir. 1997)).

The District of Columbia Circuit's decision to "accord at least some deference" to revenue rulings is in direct conflict with the holdings of the Tax Court and the Eight, Eleventh, and Federal Circuits. The "at least some deference" standard promulgated by the District of Columbia Circuit is also in conflict with the varying deference standards pronounced by the Second, Third, Fourth, Fifth, Sixth, Seventh, and Ninth Circuits. The District of Columbia Circuit's decision exemplifies the need for this Court to issue clear guidance on the issue of deference to revenue rulings. Absent clear guidance from this Court, similarly situated taxpayers will continue to be treated differently solely based upon the circuit in which the litigation occurs.

II. REVENUE RULINGS ARE NOT ENTITLED TO DEFERENCE

First, granting deference to revenue rulings is patently unfair to taxpayers. Giving deference to revenue rulings empowers the IRS to predetermine the outcome of litigation

by merely issuing its litigating position in the form of a revenue ruling. In the extreme case, the IRS can abrogate the power of the courts and assure itself victory by issuing a revenue ruling during ongoing litigation.

A revenue ruling is merely the litigating position of the IRS and should not be granted deference. *See e.g. Estate of Kostow v. Commissioner*, 45 F.3d 1524, 1528 (11th Cir. 1995); *Stark v. Commissioner*, 86 T.C. 243, 250-52 (1986); *Northern Indiana Pub. Serv. Co. v. Commissioner*, 105 T.C. 341, 350 (1995), *aff'd* 115 F.3d 506 (7th Cir. 1997). As this Court has stated, deference to "an agency's convenient litigation position" is "entirely inappropriate." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 213 (1988).

Second, unlike with Treasury Regulations, Congress has not directed the courts to defer to IRS revenue rulings. In his opinion for a unanimous Court in *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740-41 (1996), Justice Scalia, citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), explained that courts give deference to regulations, because Congress intended that statutory ambiguity be resolved in the first instance by the agency responsible for administering the statute "and desired the agency (rather than the courts) to possess whatever degree of discretion the [statutory] ambiguity allows." Justice Blackmun made much the same point in *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477 (1979), a federal income tax case. In explaining why deference should be accorded to Treasury Regulations, he referred to section 7805(a) of the Code which provides that "the Secretary [of the Treasury] shall prescribe all needful rules and regulations for the enforcement of this title. . . ." 26 U.S.C. § 7805(a). In short, under both Justice Scalia's and Justice Blackmun's formulations, courts defer to agency regulations that are reasonable interpretations of the statute because Congress said they should defer to such regulations.

Congress, on the other hand, has never directed that courts defer to IRS revenue rulings. Congress has not done so

for good reason, *i.e.*, because "[t]he deliberateness of such positions, if not indeed their authoritativeness, is suspect." *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 741 (1996).

Furthermore, as this Court has ruled, deference is owed only to an agency responsible for administering a statute. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990). Congress has unquestionably delegated to the Treasury Department the authority to administer the Internal Revenue Code by "prescrib[ing] all needful rules and regulations." I.R.C. § 7805(a). However, revenue rulings are issued by the *Internal Revenue Service* and not the Treasury Department. *See* Treas. Reg. § 601.601(d)(2)(i)(a). Thus, when issuing revenue rulings, the Internal Revenue Service speaks only for itself, and not for the Treasury Department, the agency statutorily authorized to administer the Internal Revenue Code.

Third, unlike Treasury Regulations, which are afforded deference (*see Atlantic Mut. Ins. Co. v. Commissioner*, 523 U.S. 382, 389 (1988)), revenue rulings should be given no deference because they are not subjected to the notice-and-comment process of the Administrative Procedure Act. *See* Treas. Reg. § 601.601(d)(2)(v)(d); *Mead Corp. v. United States*, 185 F.3d 1304, 1307 (Fed. Cir. 1999) (Customs and revenue rulings are not entitled to deference because they "do not carry the force of law" and are not accompanied by the "procedural safeguards" of the notice-and-comment process.) The notice and comment provided by the Administrative Procedure Act affords interested parties the opportunity to express their views by written comment and, in some cases, by oral presentation. *See* 5 U.S.C. § 553(c). Moreover, in the case of tax regulations, consideration occurs within the Treasury Department and the Internal Revenue Service at the very highest levels. *See* Treas. Reg. § 601.601. By contrast, the vast majority of revenue rulings, including the one at issue in this case, receive none of the protections afforded by notice-and-comment procedures. *See* Treas. Reg. § 601.601(d)(2)(v)(f). Rather, revenue rulings merely

represent the "official interpretation" of an Internal Revenue Service attorney. *See* Treas. Reg. § 601.201(a)(6); Treas. Reg. § 601.601(d)(2)(i)(a); Rev. Proc. 99-1, 1991-1 I.R.B. 6; Rev. Proc. 89-14, 1989-1 C.B. 814.

Additionally, unlike Treasury Regulations, revenue rulings are not published in the Federal Register or codified in the Code of Federal Regulations. *See* Treas. Reg. § 601.201(a)(6). Rather, a revenue ruling is published in the Internal Revenue Bulletin. *See id.* As noted by Justice Douglas in his dissenting opinion in *Commissioner v. Idaho Power Co.*, 418 U.S. 1, 33 (1974), "each issue of the Internal Revenue Bulletin warns that 'Revenue Rulings . . . reported in the [Internal Revenue] Bulletin do not have the force and effect of Treasury Department Regulations,'" and, accordingly, should not be granted deference.

III. IMPORTANCE OF THE ISSUE

The importance of a uniform deference standard cannot be overstated. The IRS has issued thousands of revenue rulings. In 1999 alone, the IRS issued more than one hundred rulings addressing the full gamut of the tax code. Each of these rulings is subject to varying degrees of deference in the circuits, ranging from no deference to great deference. This lack of uniformity is unacceptable. Predictability and the uniform administration of the tax system are recognized as legitimate concerns and rights of taxpayers. As the Ninth Circuit stated in *First Charter Finance Corp. v. United States*, 669 F.2d 1342, 1345 (9th Cir. 1982), "[u]niformity among circuits is especially important in tax cases to ensure equal and certain administration of the tax system."

The lack of uniformity on the deference issue creates needless uncertainty in taxpayers' ability to plan their business affairs. Moreover, this lack of uniformity often protracts disputes between taxpayers and the IRS, resulting in increased costs to both parties. These costs are incurred at both the administrative level and before the federal courts. The costs include those measurable in dollars, such as

attorneys' and accountants' fees, and lost productivity from key employees involved in tax litigation. Only this Court can eliminate this uncertainty and ensure a uniform rule for all parties.

* * * *

In light of the number of circuits that have already addressed the deference issue, it is unlikely that additional consideration by the courts of appeals will elucidate the issue further or otherwise aid the Court in its ultimate disposition of the matter. This issue is appropriate for review now, and nothing is gained by postponing this Court's consideration of this important issue of tax administration.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

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